

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL: SB 1190

INTRODUCER: Senator Atwater

SUBJECT: Hospitals/Sale or Lease

DATE: March 17, 2006

REVISED: 03/22/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HE</u>	<u>Fav/1 amendment</u>
2.	<u></u>	<u></u>	<u>GO</u>	<u></u>
3.	<u></u>	<u></u>	<u>CA</u>	<u></u>
4.	<u></u>	<u></u>	<u></u>	<u></u>
5.	<u></u>	<u></u>	<u></u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

## Please see last section for Summary of Amendments

Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

### I. Summary:

Section 155.40, F.S., establishes requirements relating to the sale or lease of a county, district, or municipal hospital. Subsection 155.40(7), F.S., specifies that the lessee of a public hospital shall not be construed to be “acting on behalf of” the lessor unless the lease document expressly provides to the contrary. The bill extends this provision to a purchaser of a public hospital. The bill provides that the *purchaser* of a hospital, pursuant to s. 155.40, F.S., or any special act of the Legislature, may not be construed to be “acting on behalf of” the *seller* as that term is used in statute, unless the *purchase* document expressly provides to the contrary. Proponents of the bill have stated that the purpose of this change is to address the applicability of public records requirements to a private purchaser of a public hospital.

This bill amends section 155.40, Florida Statutes.

### II. Present Situation:

#### Constitutional Access to Public Records and Meetings

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The state’s Public Records Act, in ch. 119, F.S., and the

public meetings law, in ch. 286, F.S., were first enacted in 1967.<sup>1</sup> These statutes have been amended numerous times since their enactment.

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment, which guaranteed and expanded the practice. Article I, s. 24 of the State Constitution provides every person with the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The section specifically includes the legislative, executive and judicial branches of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

### **Sale or Lease of a Public Hospital**

Section 155.40, F.S., authorizes any county, district, or municipal hospital organized and existing under the laws of Florida, acting by and through its governing board, to sell or lease the hospital to a for-profit or not-for-profit Florida corporation, and enter into leases or other contracts with a for-profit or not-for-profit Florida corporation for the purpose of operating and managing such hospital and any or all of its facilities of whatsoever kind and nature. The term of any such lease, contract, or agreement and the conditions, covenants, and agreements to be contained therein must be determined by the governing board of the county, district, or municipal hospital. The governing board of the hospital must find that the sale, lease, or contract is in the best interests of the public and must state the basis of the finding. If the governing board of a county, district, or municipal hospital decides to lease the hospital, it must give notice and comply with the requirements of the section.

Subsection 155.40(6), F.S., provides that, *unless otherwise expressly stated in the lease documents*, the transaction involving the sale or lease of a hospital *may not be construed* as: a transfer of a *governmental function* from the county, district, or municipality to the private purchaser or lessee; constituting a financial interest of the public lessor in the private lessee; or making a private lessee an integral part of the public lessor's decisionmaking process. Under subsection 155.40(7), F.S., the lessee of a hospital, pursuant to s. 155.40, F.S., or any special act of the Legislature, operating under a lease may not be construed to be "acting on behalf of" the lessor as that term is used in statute, *unless the lease document expressly provides to the contrary*.

A newspaper and its publisher brought an action against a *private lessee of a public hospital* (not a private purchaser) seeking mandamus, injunctive, and declaratory relief regarding a public

---

<sup>1</sup> Chapters 67-125 and 67-356, L.O.F.

records request for the lessee's board minutes. The First District Court of Appeal found that the apparent purpose of subsections 155.40(6) and (7), F.S., are to exempt *private lessees* (not a private purchaser) from the public records and meetings laws *as argued by Baker County Medical Services, Inc.*, (a lessee not a purchaser) in support of its argument for nondisclosure. The court held subsections 155.40(6) and (7), F.S., unconstitutional because there were not any legislative findings regarding public necessity for the exemption *as argued* when the subsection was enacted by the Legislature.<sup>2</sup> Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

The First District Court of Appeal ultimately held in favor of nondisclosure of the board minutes because the court found that s. 395.3036, F.S., provided the *lessee of the public hospital* an exemption from the Public Records and Meetings Laws.

### **West Volusia Hospital Authority**

The Florida Legislature created West Volusia Hospital Authority (Authority), an independent taxing district, in 1957.<sup>3</sup> The Authority was empowered to establish, construct, operate, and maintain such hospitals as in the elected governing board's opinion were necessary for the preservation of the public health, public good, and for the use of the people of the district, and to provide care to the indigent sick residing within the taxing district without charge in those facilities. The Authority developed, owned and operated the West Volusia Memorial Hospital until 1994 through public facilities. In 1993, the Authority negotiated with Memorial Health System to *lease and operate* Volusia Memorial Hospital.<sup>4</sup> In 1994, a local newspaper filed a complaint seeking a declaratory decree that the records of Memorial Health System were public and the meeting were subject to the public meetings law. The Circuit Court in Volusia County entered a summary final judgment in favor of Memorial Health System. The Fifth District Court of Appeal reversed and held that Memorial Health System was subject to the public records and meetings laws.<sup>5</sup> The Florida Supreme Court upheld the Fifth District Court of Appeals and held that Memorial Health System, *a lessee not a purchaser of a public hospital*, was acting on behalf of the Authority in performing and carrying out obligations of the agreement.<sup>6</sup> The Supreme Court also held that the totality of factors demonstrates that the authorized function of the Authority was transferred and delegated to a private corporation, a lessee.<sup>7</sup>

In a recent action, the Circuit Court in Volusia County granted a newspaper's motion for final summary judgment and denied Memorial Hospital-West Volusia, Inc.'s motion for summary

---

<sup>2</sup> See *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), which upheld the constitutionality of the exemption under s. 395.3036, F.S.

<sup>3</sup> See section 1, chapter 57-2085, Laws of Florida.

<sup>4</sup> Memorial Health System leased and operated Authority-owned hospital facility and other assets through, Hospital Corporation, a not-for-profit corporation. Under the lease, the Hospital Corporation agreed to provide indigent care for the indigent sick in taxing district and the Authority agreed to reimburse the corporation for those services.

<sup>5</sup> See *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.* 695 So.2d 418 (Fla. 5<sup>th</sup> DCA 1997).

<sup>6</sup> See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So.2d 373 (Fla. 1999).

<sup>7</sup> *Id.*

judgment.<sup>8</sup> The Circuit Court in Volusia County declared that the public records law applies to the Memorial Health System, *a purchaser (not a lessee) of a public hospital*, when it engaged in the function of operating the hospital and caring for the indigent within the taxing district of the Authority under and pursuant to the terms and conditions of the transfer documents.<sup>9</sup> The Circuit Court ordered that, as of the effective date of the transfer documents, Memorial Health System, *a purchaser (not a lessee) of a public hospital*, must comply with the Public Records and Meetings Laws.<sup>10</sup> The Circuit Court's decision has been appealed to the Fifth District Court of Appeal.<sup>11</sup>

### **Public Records and Meetings Requirements for Leased Hospitals**

Section 395.3036, F.S., provides that the records of a private corporation that *leases* a public hospital or other public health care facility are confidential and exempt from the Public Records Law and s. 24(a), Art. I of the State Constitution and the meetings of the governing board of a private corporation are exempt from the Public Meetings Law and s. 24(b), Art. I of the State Constitution when the *public lessor* complies with the public finance accountability provisions of s. 155.40(5), F.S., with respect to the transfer of any public funds to the private lessee and when the private lessee meets at least three of the following five criteria:

- The public lessor that owns the public hospital or other public health care facility was not the incorporator of the private corporation that leases the public hospital or other health care facility;
- The public lessor and the private lessee do not commingle any of their funds in any account maintained by either of them, other than the payment of the rent and administrative fees or the transfer of funds;
- Except as otherwise provided by law, the private lessee is not allowed to participate, except as a member of the public, in the decisionmaking process of the public lessor;
- The lease agreement does not expressly require the lessee to comply with the requirements of the Public Records and Meetings Laws; and
- The public lessor is not entitled to receive any revenues from the lessee, except for rental or administrative fees due under the lease, and the lessor is not responsible for the debts or other obligations of the lessee.

The Circuit Court in Hillsborough County in a consolidated case held that the Florida Health Sciences Center, Inc., the entity that leases Tampa General Hospital is subject to the public records and meetings laws. The Circuit Court also declared s. 395.3036, F.S., is unavailable to the Florida Health Sciences Center, Inc., *a lessee*; to the extent, it would exempt all of the

---

<sup>8</sup> See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp. and Tanner Andrews, Case No. 2002-31972, Seventh Judicial Circuit, Volusia County, (February 16, 2005).

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> See Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, Et Al., Case Number 5D05-925.

center's meetings and records from the public records and meetings laws. The Circuit Court also declared s. 395.3036, F.S., unconstitutionally overbroad.<sup>12</sup>

### III. Effect of Proposed Changes:

The bill revises subsection (7) of s. 155.40, F.S., which specifies that a lessee of a public hospital shall not be construed to be “acting on behalf of” the lessor unless the lease document expressly provides to the contrary. The bill extends this provision to a purchaser of a public hospital. The bill provides that the *purchaser* of a hospital, pursuant to s. 155.40, F.S., or any special act of the Legislature, may not be construed to be “acting on behalf of” the *seller* as that term is used in statute, unless the *purchase* document expressly provides to the contrary.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

#### B. Public Records/Open Meetings Issues:

In *Baker* as discussed supra, the First District Court of Appeal found that the apparent purpose of subsections 155.40(6) and (7), F.S., are to exempt *private lessees* (not a private purchaser) from the public records and meetings laws *as argued by Baker County Medical Services, Inc.*, (a lessee not a purchaser) in support of its argument for nondisclosure. The court held subsections 155.40(6) and (7), F.S., unconstitutional because there were not any legislative findings regarding public necessity for the exemption *as argued* when the subsection was enacted by the Legislature.<sup>13</sup> Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Under ch. 119, F.S., “agency” is defined to mean any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of* any public agency. Arguably, if a public hospital is purchased by a private entity and is not acting on behalf of any public agency and there is

---

<sup>12</sup> See *Florida Health Sciences Center, Inc. v. The Tribune Co., The Tribune Co. v. Florida Health Sciences Center, Inc., Times Publishing Co. v. Hillsborough*, Case nos. 99-580, 99-605, 99-1082 (October 22, 1999). The Second District Court of Appeal in Case No. 2D99-4386 affirmed in a per curiam opinion and appellant's motion for rehearing and motion for certification of questions to the Florida Supreme Court were denied. However, see, *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), which upheld the constitutionality of the exemption under s. 395.3036, F.S.

<sup>13</sup> See *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), which upheld the constitutionality of the exemption under s. 395.3036, F.S.

no transfer of or delegation of any governmental functions by the seller, a local government, then the Public Records and Meetings Laws would not apply.<sup>14</sup>

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---

---

<sup>14</sup> See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp. and Tanner Andrews, Case No. 2002-31972, Seventh Judicial Circuit, Volusia County, (February 16, 2005).

---

## VIII. Summary of Amendments:

### **Barcode 551812 by Health Care:**

Revises provisions relating to the sale or lease of a public hospital to a private party to provide that, unless expressly stated in the sale documents, the sale of a hospital shall not be construed as: a transfer of a governmental function from the county, district, or municipality to the private purchaser; constituting a financial interest of the public seller in the private purchaser; or making a private purchaser an integral part of the public seller's decision-making process. The purchaser of a hospital, operating after a sale of the hospital, is not "acting on behalf of" the seller and is not an agency within the meaning of that term as used in the Public Records Law, unless the sale document expressly provides to the contrary. (WITH TITLE AMENDMENT)

---

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---